Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-7351 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY ALAN WALTON,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

PETITIONER'S REPLY BRIEF

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RESTATEMENT OF THE FACTS

Respondent's recitation of the facts of this case is highly editorialized. It recounts actions never described by a witness; it identifies Petitioner Walton as the instigator of events for which the testimony does not assign responsibility.[1]

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[1]Respondent's Statement of the Case begins by asserting that "petitioner asked Sherold Ramsey and Robert Hoover to help him rob an old drunk ...." Resp. Brief 1. The cited testimony--Ramsey's--neither says nor suggests "petitioner asked" the others to commit this crime; when pressed by the prosecutor to specify who talked about these plans, Ramsey said "all of us." J.A. 10. Respondent dramatizes the confrontation between Petitioner and Mr. Powell, saying "Petitioner confronted Powell, cocked his gun, and ordered him to empty his pockets ...." Resp. Brief 1. The cited parts of the record contain no testimony Petitioner "cocked his gun". Ramsey did testify that Mr. Powell put his belongings on top of the car and lay on the ground; but when asked if someone told him to do that, she said "I think he just done that automatically." J.A. 19.

Respondent says "Petitioner put Powell in the back seat ...." Resp. Brief 1. Ramsey did say Mr. Powell got in the back seat of the car with Petitioner; when asked who told him to do that, she testified "I don't remember." J.A. 19.

It consistently strains the record in an effort to conceal how far the state courts stretched Arizona's death penalty law in applying it to Petitioner.

This practice likely explains the important divergences of the Arizona Supreme Court's opinion from the evidentiary record, which are pointed out in our opening brief. See Pet. Opening

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Respondent says that, at Gates Pass "Powell was ordered out of the car and forced to lay on the ground." Resp. Br. 1. Ramsey's testimony included no references to any "order" or "force"; she said "I guess he just got back down on the ground, I don't remember. I don't remember seeing him standing." J.A. 24. Respondent says that "Petitioner and Hoover then began arguing in Powell's presence about what to do with him," and "[e]ventually, Hoover stated he did not care what petitioner did with Powell." Resp. Br. 1. Ramsey described no such prolonged discussion, and she specified that "Rob and Mike were just arguing about what they were going to tie him up with or whatever, and Rob said he didn't care what he tied him up with, just hurry ...." J.A. 24.

Respondent says "Petitioner boasted that he never saw a 'man pee in pants before.'" Resp. Br. 2. Ramsey described no "boasting;" the whole of her description was this sentence: "He said he never seen a man pee in his pants before." J.A. 30.

Brief 46 n.36. Looseness with the facts is troubling in any case where life is at stake. In a case where the State is seeking to support a death judgment on the basis of facts found outside the traditional process of trial by jury--facts found primarily by an appellate court--it is particularly insidious. The validity of that judgment, and of part of the statute on which it was based, may turn on the precise interpretation of that statute, as evidenced by its application to the facts of the case at hand.[2] The kind of shading of the record that pervades Respondent's Brief is particularly inappropriate in this context.

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[2]In this regard, we discuss one of Respondent's most striking and blatant misrepresentations of the record, made in its attempt to justify the Arizona Supreme Court's undeniable misstatement that Mr. Powell "begged for his life" at the scene of the homicide, in Part III, below.

I. RESPONDENT'S ARGUMENT IMPERMISSIBLY ALLOWS THE MERE LABEL "AGGRAVATING CIRCUMSTANCES" TO CONTROL THE REACH OF THE SIXTH AMENDMENT RIGHT TO JURY TRIAL.

Respondent acknowledges that the Arizona statutory scheme "does not provide for jury determination of the ... circumstances necessary to impose death." Resp. Br. 5. It makes no attempt to square such a statute with the concept of "trial by jury" understood by the framers of the Sixth Amendment, or the notions of "due process of law" held by the authors of the Fourteenth Amendment. Instead, it argues that the statute is exempt from the Sixth Amendment because it uses the phrase "aggravating circumstances" to describe the particular factual findings it withdraws from the jury, and because it resembles the Florida death sentencing scheme that this Court has previously upheld. We will answer those points in turn.

A. The "Aggravating Circumstance" Label.

If Respondent's argument is right, it is sufficient to eliminate the right to trial by jury that a State has labeled the factual elements that distinguish its greater crimes from lesser ones--murder, for example, from assault--as "aggravating circumstances," and has called the proceeding at which they are adjudicated a "sentencing hearing." The Court cannot uphold the Arizona statute without condoning this result. For if a State can take from the jury factual issues which are the basic ingredients of actus reus and mens rea, facts that must be found to render the defendant legally eligible for the qualitatively more severe punishment of death, the States can do the same thing for any element of any serious crime. Respondent has suggested no limiting principle, and we can conceive of none.

Constitutional rights in a federal system must turn on substance, not form. There is nothing talismanic about labeling a fact an "aggravating circumstance" or an "element of the offense." Nothing in the Sixth or Fourteenth Amendments attaches significance to such generic legal phrases.[3] A constitutional system must look beyond labels to the actual function served by a particular fact finding under state law, to determine what process is due in making it.

The substantive distinction that Respondent's argument ignores is between a purely factual determination prescribed by

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[3]The phrase "element of the offense" has no fixed meaning, in Arizona or any other state of which we are aware. Nowhere do Arizona's statutes define that phrase, or denominate any particular term used in their definition of crimes as an "element" of the criminal offense. The term "element" is a generic one, which can be applied as accurately to the statutory aggravating circumstances listed in A.R.S §13-703F, as to any other fact which Arizona law makes prerequisite to criminal punishment.

state law as the necessary condition of a defendant's eligibility for a more severe range of sentences including death, and the "reasoned moral response to the defendant's character and crime," see Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989) that is the sentencing decision itself. When this Court held that the latter decision on the appropriate sentence to be imposed may be left to judges in capital cases, it did so by analyzing the nature of the decision, Spaziano v. Florida, 468 U.S. 447 (1984), in terms that contrasted sharply with the kind of determination of "guilt or innocence," id. at 458, which has always been the province of a jury.

Arizona has crossed the constitutional line here. No substantive distinction relevant to the purposes of the Sixth Amendment can be made between the determination that Jeffrey Walton acted in an "especially heinous, cruel, or depraved"

manner, and the determinations of mens rea that are always left to juries in other types of criminal cases--determinations that, for example, a homicide was "malicious" or an assault was committed with "intent to maim" or a motor vehicle was operated with a "wanton disregard for human life." The nature of the factual issues is the same. So is their source--a definitional component of the applicable state criminal statute--the procedures for finding the facts, and the significance of the facts to the range of available punishments.

Arizona is, of course, free to "divide up [its trial procedures] ... any way it wishes, and employ whatever terminology it desires, for nonconstitutional purposes." Mistretta v. United States, 109 S.Ct. 647, 681 (1989) (dissenting opinion of Justice Scalia). But it is necessarily this Court's function to determine whether the

factual issues its law defines are ones to which the Sixth Amendment guarantee of "trial ... by jury" applies. Ibid. By every substantive measure, it must apply here.

B. The Court's Florida Decisions.

Respondent overreads the Court's decisions approving the Florida statute and glosses over the very real differences between what are called "aggravating circumstances" under Florida and Arizona law.

The Florida statute does not say that "[i]f the trial court does not find any of the listed aggravating factors, 'the court shall impose a sentence of life imprisonment.' Fla.Stat.Ann. §921.141(3)." Resp. Br. 10. Rather, the questions posed by Florida law--first to the jury, then to the judge--are always phrased in terms of whether "sufficient" aggravating circumstances exist. Fla.Stat.Ann. §921.141(2)(a)

and (3)(a).[4] That is one of the "considerations" that go into the jury's recommendation, Fla.Stat.Ann. §921.141(2)(c), and into the final decision of the judge, who is permitted to "enter a sentence of life or death" "after weighing the aggravating and mitigating circumstances." Fla.Stat. Ann. §921.141(3). Thus, in language and effect, Florida's aggravating circumstances bear no resemblance to the traditional understanding of an element of an offense. Their core function is the facilitation of judicial review, in order to avoid arbitrariness and promote regularity in the imposition of capital punishment. See State v. Dixon, 283 So.2d 1, 8 (Fla.

[4]For the Court's convenience, we have set out the relevant provision of Florida law, Fla. Stat. Ann. §921.141 (1985), as an Appendix to this Brief.

1973).[5] Elements of offenses are found either to exist or not to exist; they are the not found to be present in "sufficient" or "insufficient" amounts. Elements of an offense are not "considerations;" they are the threshold requirement for placing a defendant in a category subject to the punishment prescribed by law for a given criminal act.

Arizona's "aggravating circumstances" have all of the characteristics of elements of an offense.[6] The statute requires the

[5]As construed by the Florida courts under compulsion of the Eighth Amendment, the Florida aggravating factors have also evolved to set a threshold for imposition of the death sentence. See Barclay v. Florida, 463 U.S. 939, 960 (1983) (concurring opinion of Justice Stevens). But that function is incidental to the one prescribed by the Florida statute--the principal consideration governing the process due with respect to a given factual finding. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 119-23 (1975).

[6]This Court did not hold otherwise in Poland v. Arizona, 476 U.S. 147 (1986). Although Fifth and Sixth Amendment analysis may diverge on such points, see Spaziano v. Florida, supra, 468 U.S. at 458-59, Poland

court to determine only "the existence or nonexistence" of the statutorily listed aggravating facts. A.R.S. §13-703E. If "one or more" of these facts are found, the defendant is death-eligible, and the burden shifts to him to establish grounds for "leniency." A.R.S. §13-703E. The sentencing court is not authorized to reexamine whether that factor is

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undoubtedly would have been decided exactly the same way if it had involved a non-capital offense which could be established by alternative parallel elements, instead of a capital offense which could be made out by proof of alternative aggravating circumstances. Just as "the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)," Poland v. Arizona, supra, 476 U.S. at 156, the failure to find any particular element of a criminal offense that can be proved in alternative ways does not constitute "[a] verdict of not guilty, [which] ... absolutely shields the defendant from retrial." Tibbs v. Florida, 457 U.S. 31, 41 (1982). Poland thus compels no conclusion that there is a distinction between Arizona's "aggravating circumstances" and the elements of an ordinary criminal offense, for any constitutional purpose.

"sufficient" to warrant death.[7] The finding of that factor is not merely a "consideration"; it is both necessary and sufficient to make the defendant guilty of a crime punishable by the death penalty.

By failing to distinguish the dissimilar functions played by "aggravating circumstances" in Arizona and Florida, Respondent misapplies the Court's cases in this area. The Court has held that judges may make and review the ultimate capital sentencing decision--"a determination of the appropriate punishment to be imposed on an individual." Spaziano v. Florida, 468 U.S. at 459. It therefore does no violence to the Sixth Amendment to say, as the Court did in Hildwin, that a trial judge may record the facts that he included in the balance in deciding between life and death,

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[7]Respondent's contrary suggestion that the trial judge can assess the sufficiency of aggravation to warrant death, Resp. Br. 29, 33, is answered in Part II, below.

for the purpose of facilitating appellate review of that decision. See Gardner v. Florida, 430 U.S. 349, 360-61 (1977).[8] And of course the Sixth Amendment has nothing to say about whether the State uses a judge or a jury to make the Eighth Amendment culpability finding required by Enmund v. Florida, 458 U.S. 782 (1982). See Cabana v. Bullock, 474 U.S. 376, 386 (1986). But the observation that those findings may

[8]Respondent places great emphasis on the fact that one of the aggravating factors ultimately relied on to explain the death sentence in Spaziano was one not placed before the jury in that case, Resp. Br. 11, a fact the Court noted only in passing. If no evidence of any aggravating circumstance had been placed before Spaziano's jury, his case would have more closely resembled the Arizona statutory scheme. But all that actually happened in Spaziano is that the judge gave an additional statutorily-based reason for imposing a death sentence on a defendant he had previously found death-eligible on the basis of another aggravating circumstance of which there was evidence before the jury. Compare Zant v. Stephens, 462 U.S. 862 (1983). And the additional reason he gave involved a prior conviction of the defendant, not a fact about the offense. Cf. State v. Quinn, 290 Ore. 383, 623 P.2d 630, 643 (1981).

resemble, and even overlap, the factual elements demanded by state law to bring the defendant's crime within a category of offenses subject to the death penalty, does not deprive the defendant of the jury-trial rights that must attach to the latter elements if the Sixth Amendment is to have any practical meaning in capital cases.

II. RESPONDENT IGNORES THE MANNER IN WHICH EACH ASPECT OF ARIZONA'S STATUTORY PRESUMPTION OF DEATH CONTRIBUTES TO THE UNACCEPTABLE RISK OF ERRONEOUS DEATH SENTENCING.

The gloss placed by Respondent on the Arizona death sentencing statute bears little resemblance to the manner in which the statute operates in fact, in several respects.

Generally, the multi-step process Respondent describes--wherein factfinding is followed by weighing which is followed by the ultimate sentencing decision, see Resp. Br. 16-17, 25--is more conceptual than real. Most Arizona cases in which

death is imposed actually proceed much as Petitioner's did: a single sentencing order is issued which lists the aggravating factors found, states in a more or less conclusory manner that mitigating circumstances have been considered and found not to be "sufficiently substantial to call for leniency," and concludes that the defendant is "therefore" sentenced to death. See J.A. 56-58, 59-69.[9]

Respondent's representation that the Arizona Supreme Court has imposed a requirement that "[i]f the trial court rejects mitigating evidence, it must explain its reasons for doing so," Resp.

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[9]Significantly, the trial court's sentencing decision was read immediately after the arguments of counsel ended; no recess or other event intervened. The Joint Appendix does not clearly indicate this; the apparent break in the proceedings it reflects (at pages 55-56) does not occur in the actual transcript, which shows that immediately after the prosecutor concluded his argument (with the words "death penalty," J.A. 55) the court began announcing its decision (by saying "Mr. Walton, ..." J.A. 56).

Br. 17, is even not even theoretically accurate. The case which Respondent cites for this proposition, State v. Leslie, 147 Ariz. 38, 708 P.2d 719 (1985), contains only the most general dictum "that the better practice is for the trial court to place, on the record, a list of all factors offered by the defendant in mitigation and then explain his reasons for accepting or rejecting them." 708 P.2d at 731 (emphasis added). That suggestion has never had the force of law in Arizona. Both before Leslie and since, the Arizona Supreme Court has rejected arguments that it was reversible error for a trial court not to enter such findings. See State v. Vickers, 129 Ariz. 506, 633 P.2d 315, 325 (1981); State v. Beaty, 158 Ariz. 232, 762 P.2d 519, 533 (1988); State v. McCall, 160 Ariz. 119, 770 P.2d 1165, 1171 (1989). Again, this case well illustrates the prevalent Arizona practice of making only the most

general statement that mitigating circumstances have been "considered" and found insufficient to "call for leniency." J.A. 56-7.

Respondent acknowledges Arizona's mandatory presumption of death only in its starkest form: "[w]here one or more statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty to be imposed." Resp. Br. 29. Respondent largely ignores the broader effect that the Arizona Supreme Court has repeatedly given the presumption, in this case and others, requiring that "aggravating circumstance[s] [be] outweighed by the mitigating circumstance[s]," State v. Brookover, 124 Ariz. 38, 601 P.2d 1322, 1325 (1979), in order to permit a sentence less than death.[10]. Conversely, Respondent invents

[10]See, e.g., J.A. 94; State v. Gretzler, supra, 659 P.2d at 13-14; State v. Moorman, 154 Ariz. 578, 744 P.2d 679,

the notion that Arizona law "clearly" allows the trial court to "determine the weight to be given an aggravating factor." Resp. Br. 29 n.9. The cases cited to support that proposition do not; instead, they state that a defendant "may offer evidence of the circumstances of the crime as potentially mitigating evidence under §13-703(G)." State v. Romanowsky, 1989 Ariz. Lexis 183, at 33 n.9 (1989) (emphasis added). No Arizona cases hold that an aggravating circumstance, once found, is entitled to more or less weight because of the evidence supporting it.[11] And,

688 (1987); State v. LaGrand, 153 Ariz. 21, 734 P.2d 563, 579 (1987). At one point in its Brief, Respondent appears--possibly inadvertently--to say that the statutory balance is the opposite of this, requiring death only where "aggravating circumstances outweigh the mitigation" Resp. Br. 31 n.10. That is clearly not Arizona law.

[11]We can find nothing relevant to Respondent's argument on this point in State v. Gillies, 135 Ariz. 500, 662 P.2d 1007, 1018 (1983). State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828, 849 (1981), says and holds only that extrinsic evidence

indisputably, Arizona law does not allow trial judges to discount the weight of aggravating circumstances in the only situation where doing that could make a real difference: by holding that, despite the absence or insufficiency of mitigation, a particular aggravating circumstance is not enough to warrant death.[12]

Finally, the Arizona Supreme Court's sporadically-conducted "independent review," referred to in Respondent's Brief (at 30), is governed by the same statutory presumption of death.[13] In Petitioner's

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may be "received by the sentencing court to establish the existence of the second aggravating circumstance under our death penalty statute...." (emphasis added).

[12]As noted in the Appendix to our Opening Brief, a number of other States do allow this, by statute and, increasingly, by caselaw. See, e.g., Proffitt v. State, 510 So.2d 896 (Fla. 1987); Menedez v. State, 419 So.2d 312 (Fla. 1982); Keeton v. State, 724 S.W.2d 58 (Tex. Cr. App. 1987).

[13]In Petitioner's case, like many others, it is not totally clear what kind of an independent review--as opposed to a determination of "whether the trial judge

case, for example, appellate review was conducted by applying the presumption: the Court's specific and general conclusions in affirming were that there were "no mitigating circumstances sufficient to call for lenience in sentencing." J.A. 104; see

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erred in his special verdict on the aggravating and mitigating findings," J.A. 96--the Arizona Supreme Court conducted. The Arizona court has indicated that its review is sometimes conducted silently, without any explicit statement in the decision that the review has even occurred. See State v. Tison, 142 Ariz. 446, 690 P.2d 747, 751 (1984). Where it has set forth a review process, it has given varying descriptions of what standards have governed it. See, e.g., State v. Gretzler, supra, 659 P.2d at 14 (reversal of death sentence permitted only where death sentence "erroneously imposed"); State v. Adamson, 136 Ariz. 250, 665 P.2d 972, 988 (1983) (review to "independently determine if the trial court correctly applied aggravating and mitigating circumstances"); State v. Beaty, 158 Ariz. 232, 762 P.2d 519, 529 (1988) (review "to determine whether the death penalty was improperly imposed or should be reduced to life"). See also State v. Rumsey, 136 Ariz. 175, 665 P.2d 48, 55 (1983) (independent review conducted "as an appellate court, not as a trial court"); State v. Smith, 131 Ariz. 29, 638 P.2d 696, 700 (1982) (on review, "the credibility of ... witnesses is for the trier of fact").

also id. at 103. Similar language has been used in other cases describing the review function. See, e.g., State v. Lambright, 138 Ariz. 63, 673 P.2d 1, 14 (1983); State v. Richmond, 136 Ariz. 312, 666 P.2d 57, 66 (1983). Since the Arizona statutes make no special provision for appellate review of the sentence imposed in a capital case, it would be surprising if the Arizona court took any different approach.

Respondent's attempt to dress up the Arizona sentencing process, in an effort to pass this Court's muster, cannot change what the Arizona courts have repeatedly said and done in sentencing, in this case and others. Neither can its treatment of the sentencing process in this case. Resp. Br. 38.

The record contains no indication that the trial court's rejection of Petitioner's mitigating evidence of drug use and childhood physical and sexual abuse was

based on anything other than the statutory preponderance standard. The court's single conclusory statement that it had "considered all other mitigating factors set forth" (J.A. 56) is at best ambiguous and cannot have been meant in the broad sense in which Respondent would read it.[14] Similarly, the record nowhere suggests that the trial court "exercised its discretion and found the aggravating factors in Petitioner's case sufficiently substantial

[14]The court's statement that it had "considered ... all other mitigating circumstances as stated by your attorney on the record this date"--cannot mean that the court gave mitigating weight to all those circumstances. The sentencing order was plainly written before any "mitigating circumstances" were "stated" by Mr. Walton's attorney in open court. See note 9, above. Moreover, the trial court plainly and explicitly rejected one of the major arguments in mitigation--that Petitioner was not the person who shot Mr. Powell. See J.A. 48-9, 56. Since the court's summary statement that it had "considered" all the mitigating factors presented clearly included that fact, which it rejected, it is impossible to know how many other factors it heard evidence on but rejected under the preclusive statutory standard as well.

to warrant the imposition of death." Resp. Br. 38.[15] Arizona law gave the court no discretionary authority to determine if the aggravating circumstances were "sufficient," and nothing in its sentencing order intimates that it usurped that authority. To the contrary, what the sentencing order says is that the court found aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency"--and "[t]herefore" the sentence was death. J.A. 57.

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[15] The prior crime evidence that Respondent features (Resp. Br. 27), apparently in an effort to bias this Court, was neither admissible to establish an aggravating circumstance under Arizona law nor considered anywhere in the sentencing decision. If it matters, Petitioner's prior actually consisted of a single instance of robbery (which involved no weapon and no injuries to anyone) and a walkaway escape from a juvenile detention facility. See Presentence Report at 2 and App. 14. Petitioner's indictment for an alleged jailhouse assault never went to trial. That is why these events were not urged as aggravating factors under A.R.S. 13-703(F)(2).

Respondent's attempts to portray it otherwise cannot change the fact that the Arizona statute lies at the extreme end of the post-Lockett continuum, in its restriction of sentencing discretion and its bias in favor of the imposition of death. Some or all of the features that place it there may well be individually unconstitutional, as the Petitioners in the Blystone and Boyde cases now before the Court have argued. But even if no one of these features alone offends the Constitution, in combination they cannot be squared with the Eighth Amendment.

III. RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE ARIZONA COURTS HAVE CURED THE FACIAL UNCONSTITUTIONALITY OF THE STATUTORY "HEINOUS, CRUEL, OR DEPRAVED" AGGRAVATING CIRCUMSTANCE.

The most striking thing about Respondent's argument on the constitutionality of Arizona's "heinous, cruel, or depraved" aggravating circumstance is its illustration of the fact that

the Arizona Supreme Court--like its Oklahoma counterpart in Maynard v. Cartwright, 108 S.Ct. 1853 (1988)--has never developed any single touchstone by which to determine its presence or absence. Appellant's lengthy footnotes and detailed appendix only underscore the seemingly limitless variety of facts that the Arizona Supreme Court has found sufficient to qualify a defendant for death under this provision.

Respondent's arguments on this point also well illustrate how the definition of the provision has evolved, and continues to. For example, the generic definition of the statutory terms that Respondent quotes from State v. Knapp, 114 Ariz. 531, 562 P.2d 704, 716 (1987) (see Resp. Br. 41),[16]

[16]It warrants mention that the language of this Knapp "definition" closely parallels the one included in the trial court's instruction to the jury in William Cartwright's trial. See Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc).

later changed so that the focus was no longer on the defendant's "dispos[ition] to inflict pain," State v. Knapp, supra, 562 P.2d at 716, but upon the "pain and distress visited upon the victims" itself. State v. Gretzler, supra, 659 P.2d at 10. See Pet. Opening Brief at 45 n.33. From there it expanded in two directions: to include suffering that was purely psychological, as well as the experience of physical pain; and to include such suffering where it was "reasonably foreseeable," even if specifically unintended, see State v. Adamson, supra. Both of these expansions reached their current limit in this case, where the Arizona Supreme Court appears to have held that the fear and anguish suffered by the victim of a robbery, alone, is sufficient, even where the robbers made no apparent effort to enhance the fear that inevitably accompanies such a crime and even tried to

quell it by reassuring the victim he would not be harmed. See J.A. 24.

Statutes which expand from one case to the next cannot tell sentencing authorities "what they must find to impose the death penalty." Maynard v. Cartwright, supra, 108 S.Ct. at 1858. The willingness of Arizona judges to continually add to the set of examples of conduct which qualifies for death under the law "leaves them and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 ... (1972)." Ibid. It also magnifies the opportunity for error in the determination of whether some fact in a case can be analogized to something found in another, to make it qualify for inclusion through this process, as the present case vividly illustrates.

It is for this reason that, contrary to Respondent's assertion, the accuracy of the lower court's assessment of the record is very much a part of the question presented here.[17] This case is part of the body of state decisional law which Respondent claims has saved the Arizona statute from unconstitutionality under

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[17]Respondent would have the Court ignore the crucial factual errors underlying the Arizona Supreme Court's finding of "cruelty," arguing that those errors lie outside the scope of the question presented in this case. Resp. Br. 41n.14. That would be a cramped interpretation of the scope of the grant of certiorari here, indeed. The certiorari petition in this case argued, in support of its claim that the statute had been unconstitutionally "interpreted and applied by the Arizona courts," that the Arizona Supreme Court "appears to rely on whatever events are presented to it," "review[s] the record for any actions or events that it believes to be especially heinous, cruel or depraved," and applies the statute "in an arbitrary and capricious manner ...." Petition at 14-15, quoting Adamson v. Ricketts, 865 F.2d at 1036-38. Surely that submission fairly includes the point that the Arizona Court has gone so far as to rely in part on supposed facts "presented to it" in argument, without any substantial basis in the record.

Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976). It appears to mark the extreme end of the expansion of both the "cruel" and the "depraved" prongs of the statute[18]--for the present, at least. The Arizona courts found cruelness and depravity by stretching both the definition of these statutory terms and the inferences to be drawn from the record of this case, to the point where no principled restriction on its power to stretch the law and the facts can be identified. That is of central relevance to the issue here.

It is also for this reason that Respondent's looseness with the record facts is significant. In terms almost identical to the arguments that misled the

[18]The evolution and varying applications of the other parts of Arizona's F(6) aggravating factor applied here have been thoroughly traced in the Brief of Respondent in Lewis v. Jeffers, No. 89-189.

Arizona Supreme Court,[19] Respondent tells this Court that, on the way to the scene of the shooting, "Powell pled with his abductors to spare him." Resp. Br. 48. A look at the part of the record which Respondent cites for that assertion belies it. See J.A. 22-3.

Not content with that--because it lends no support to the Arizona Supreme Court's even more dramatic statement that later, just before he was shot, Mr. Powell "begged the defendant not to kill him" (J.A. 98)--Respondent takes the liberty of adding words to the transcripts of record,

[19]See Appellee's Brief at 48, State v. Walton, Arizona Supreme Court No. CR 87-0022-AP. This argument by the State appears to be the original source of the Arizona Supreme Court's confusion; Appellant's appellate public defender had no occasion to address that fact in his Opening Brief, as Respondent argues he should have, because the assertion had not been made at that time. Presumably he did not correct the assertion in his state Reply Brief because it was incidental to the State's argument, which focused completely on the post-shooting suffering experienced by Mr. Powell. Id. at 49-52.

and even italicizes those words for emphasis. Resp. Br. 49. According to the record,[20] the statement involved--related by Petitioner to police after his arrest--was actually made by Mr. Powell to Robert Hoover; the trial record reports it thus: "the guy told Rob, he goes, don't hurt me, I don't tell anybody, ((inaudible))." Tr. 12/15p at 82. The words Respondent adds to replace the ((inaudible)) are "take the car and leave." Resp. Br. 48. Apparently the inference Respondent seeks to have the Court draw from this added phrase--which appeared nowhere in the record before the Arizona Supreme Court--is that Mr. Powell made the statement at the scene of the shooting, not in the car on the way there (where Sharold Ramsey testified something similar was said, see Pet. Brief 6), and to

[20]For the Court's convenience, we have set forth the portion of the official transcript of the relevant part of Petitioner's taped statement, as Appendix B to this Brief.

Petitioner rather than Hoover or someone else. The record simply won't support that, even at the level of inference--much less to the certainty beyond a reasonable doubt Arizona law supposedly requires.

Respondent thus cannot escape the fact that the actual evidence before the Arizona Supreme Court indicated nothing more in this regard than that Mr. Powell felt the kind of fear which any robbery victim would have, and sensibly told his robbers "he would give us a ride somewhere and he wouldn't tell nobody." J.A. 22. Evidence of that kind of fear cannot provide a "principled means ... to distinguish those [persons convicted of murder] that received the death penalty from those that did not." Maynard v. Cartwright, supra, 108 S.Ct. at 1858.[21]

[21]Respondent disregards the other Arizona cases we have identified, where no "cruelty" finding was made on similar facts, because they "differ procedurally from petitioner's." Resp. Br. 44.

Of course, the fear experienced by any robbery victim can be translated into

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Procedural differences are a pale excuse for such clear inconsistencies in the application of a death penalty statute. Nor are they an adequate explanation under Arizona law, which does not deprive trial courts of the "authority to find aggravation not requested by the state," ibid., as Respondent asserts. State v. Murphy, 113 Ariz. 416, 555 P.2d 1110, 1112 (1976), held only that trial judges could not "direct[] the prosecutor to put on evidence of aggravating circumstances." (emphasis added). No evidence beyond that of the crime itself is required to determine if a homicide was "especially cruel;" that is why the cases we cited report those facts, even though the finding was not sought in some of them.

It is therefore wholly irrelevant that "the opinions do not indicate whether the state sought the cruelty factor." Resp. Br. 44. Moreover, had Respondent chosen to look even at the cases from Maricopa County (Phoenix) alone, it would have found that, in many cases, that factor was "sought" and rejected in a special verdict explicitly holding the crime was not "especially cruel." See, e.g., State v. Carr, No. Cr. 141693; State v. Vaughn, No. Cr. 134298; State v. Cookus, No. Cr. 86534; State v. Hensley, No. Cr. 117651; State v. Nash, No. Cr. 130037. Those courts concluded that the victims' fear alone would not support this finding, presumably because they recognized that nearly all homicide victims experience fear. But under this vague statute, they could only guess at what the statute could be interpreted to mean.

"mental anguish" and then "cruelty" through a rhetoric driven by understandable anger at a tragic and senseless crime. But it was largely to tether this kind of natural outrage that Maynard and Godfrey required aggravating circumstances to be clearly defined and regularly applied. To keep the promise of Gregg that statutory aggravating circumstances will control capital sentencing discretion by "'clear and objective standards so as to produce non-discriminatory application,'" 428 U.S. at 198, the statutory circumstances must be construed and applied in a "principled way [that suffices] to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," Godfrey v. Georgia, supra, 446 U.S. at 433. If that sort of principled distinction can ever be said to have been provided by Arizona's "heinous, cruel, or depraved" circumstance, it was plainly abandoned in

this case.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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January 9, 1990.

APPENDIX A

§921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of

the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific

written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

APPENDIX B

Transcript Excerpt From Petitioner's Taped Statement to the Police

Trial Transcript 12/15p 82-83

Q Do you remember if Robert got in a fight or scuffle with this man?
A He could have, I don't remember. All that I remember is the guy was, the guy told Rob, he goes, don't hurt me. I don't tell anybody, ((inaudible)).
Q Did Rob have his gun out when he said that?
A I don't think so.
Q You didn't see it? Was Rob planning on taking the man's car?
A ((No answer.)).
Q When did he plan on doing that?
A What do you mean, did he plan on taking it?
Q Well, did he decide that he was going to take the man's car, is that why there was an argument and a scuffle?
A I don't know. I don't, I don't remember there being an argument or a scuffle.
Q You remember the man saying, don't hurt me, take my car, I won't tell anybody?
A Yeah.
Q How did that come up?
A ((Inaudible)).